No. 2686

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

MRS. GLENN D. HART and
GLENN D. HART.

Appellants,

vs.

WALTER ADAIR, J. T. EPPERLY, JAMES P. BURNS, F. S. GREEN and L. B. WALLACE,

Appellees.

and

W. C. HARDING LAND COMPANY, a corporation,

Appellant.

vs.

MRS. GLENN D. HART and
GLENN D. HART.

Appellees.

Brief of Appellees Hart

On Appeal from the District Court of the United States for the District of Oregon.

E. A. LUNDBURG,
Solicitor for Appellees Hart.

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STATEMENT OF THE CASE.

The appellant W. C. Harding Land Company has in its brief made a general statement of the matters in controversy in this suit, however before entering

upon a discussion of appellant's assignments of error and of other matters which appellant seeks in its brief to inject into the record, we desire to amplify appellant's statement of the case in some particulars.

Mrs. Hart seeks the rescission of each of the contracts in controversy upon the ground that appellant made false representations of material facts in regard to the subject matter of the contracts which were relied upon by the appellee and her assignors, and induced them to enter into the contracts, and misled them to their injury, which rendered the contracts voidable and entitled the appellee to a rescission thereof by a court of equity and to a return of the moneys advanced upon the purchase price under the respective contracts.

Mrs. Hart in her bill of complaint (Record, pp. 3-13), after stating jurisdictional facts, alleges in substance in her first cause of suit wherein she seeks rescission of the contract made by the appellant with her, that the appellant's sales agent, T. W. Kendall, prior to the time the contract of sale was entered into, had represented and stated to her, in respect to the land agreed to be sold, comprising 10 acres, and designated as Lot 18, Plat "D," as follows:

(a) That Lot 18 was worth the sum of $3500.00.

(b) That appellant had caused the soil of said Lot 18 with the rest of Plat "D" to be examined by an expert orchardist, and caused the character and

quality of the soil to be examined and reported upon by such expert, and that such examination and report showed soil particularly adapted to the growing of apples and peaches, and that this tract had the best soil of that section of the Umpqua Valley for such purpose and as good as the "volcanic ash" soil of the Wenatchee District of Washington.

(c) That the soil of said tract was a deep rich loam and easily cultivated.

(d) That the tract was a sort of an upland and had perfect drainage and would not need irrigation.

(e) That said agent exhibited certain panoramic views and blue prints of the Umpqua Valley and gave this purchaser various illustrated and printed booklets, plats and maps, descriptive thereof and published by the W. C. Harding Land Company representing that the statements set out and contained therein were true and applied with equal force to said tract of Plat "D."

(f) That said Plat "D" was the choicest apple land of all the various plats and subdivisions theretofore handled and sold by his company, in that section of Oregon.

(g) That appellant company was thoroughly reliable and trustworthy and would not place on the market or offer for sale any parcel of land not suitable for the purposes represented.

(h) That it was not necessary to make a trip to Oregon to look over and examine said lot of Plat "D," but that it was entirely safe to buy it relying solely upon the statements of his company, and those made by him as agent, without seeing said tract.

(i) That this purchaser could rely upon said agent's representations so made regarding said lot and to take his word for the quality and character of the soil and its adaptability for orchard purposes as the same were true.

The bill then alleges that the statements and representations above set forth which were relied upon and induced appellee to enter into the contract were false in the following particulars:

(a) That said Lot 18 is not worth to exceed $50.00 per acre and its use and value exists only for ordinary farm purposes when drained by tiling.

(b) That it lies very low, is bottom land and in a swale.

(c) That during high water in the rainy season, the nearby creek overflows and sweeps over parts of the lot.

(d) That water stands on it during the winter months and does not drain away.

(e) That the surface soil is of a stiff, black, sticky nature, while the sub-soil is a sort of joint clay, very tough and the nature of "hard pan" through which water does not soak or drain.

(f) That the said soil is not adapted for orchard purposes and is entirely unfit for the growing or production of apples or peaches.

(g) That during the summer or dry season, said soil drys out, bakes and becomes very hard and cracks, and when plowed it turns up in great clods and chunks and is almost impossible of cultivation.

(h) That its particular qualities, character and location make it utterly worthless for orchard purposes, and to the growing and culture of apple or peach trees and to maintain the same.

The bill then alleges that appellants made further false and fraudulent statements, with knowledge that the same were false and fraudulent, inducing the appellee to act on the same to her damage and to enter into said contract and make payments thereunder in this:

(a) That appellant would plant said tract to Spitzenberg and Newton Pippin apple trees with peach tree fills not less than 46 to the acre, and give thorough cultivation and care to the same in every detail necessary to the proper growing of said trees for the period of 3 years, and that they would replace any trees that should from any cause die or become injured, and that they would deliver to this appellee a full set thoroughly cultivated planting as aforesaid.

For a second cause of suit Mrs. Hart in her bill seeks the rescission for like reasons of a like contract between appellant and Glenn D. Hart, her husband, with respect to Lot 19, of said Plat "D," and alleges the payments thereunder made, and alleges that on April 23, 1912, Glenn D. Hart for value assigned to appellee all his right, title and interest, claim or demand in and to said contract, which assignment was duly approved by appellant and by B. L. Eddy, Trustee.

For a third cause of suit Mrs. Hart in her bill seeks the rescission for like reasons of a like contract between the appellant and Ella Peterson, with respect to the sale of Lot 17, of said Plat "D," and alleges the payments made thereunder, and alleges that prior to the institution of this suit Ella Peterson for value assigned to appellee all her right, title and interest, claim or right of action in and to said contract.

The bill then prays the rescission of each of the contracts and for the return of the payments made on the purchase price under said contracts with interest, and judgment therefor against all the defendants.

The foregoing is deemed a sufficient reference to the allegations of the bill in view of the appellant's alleged errors of the trial court and its brief thereon.

Issue was joined on the allegations in each cause of suit of the bill of complaint by the appellant W.

C. Harding Land Company, denying the same in the language of the complaint, and by alleging that the soil of the several tracts was of a deep, fertile nature, well adapted to the purposes for which it was sold, but admitting that it was unknown to appellant that at the time it was sold said land was not particularly adapted to the growing of peaches, and further alleging that appellant had fully performed each of the contracts as to the planting and cultivation features.

The appellant further answered each cause of suit, by alleging that the peach trees were planted for temporary purposes only by the parties to the contracts, and as soon as appellant ascertained that the peach trees did not flourish as it believed it would it did everything in its power to fully perform and comply with the exact terms of its contracts and did offer thereafter to substitute pear trees as such fillers for the peach trees for the reason that it was known that said soil and climate was especially adapted to the growing of pears, and,

That appellant alleges further that up to the time of the expiration of its contract for the care and cultivation of the tracts the same were in good first class condition in all respects as represented by appellant, except that the peach trees remaining thereon were not as vigorous and healthy as it was hoped they would be and that thereafter the land and orchards were not in as good condition as they

would have been had they received proper care and attention.

(Appellant's Answer, pp. 32-40.)

It was upon the issues as outlined above that the appellant submitted its case in the court below and the case was tried on the merits.

The appellant did not interpose any defense to appellees' bill claiming a ratification of the contracts or any of them in the court below; it is true however that the answer of Adair, Epperly, Burns, Green and Wallace, the land owners, to appellees' bill in the court below interposed a defense, alleging that after each of the purchasers mentioned in the bill of complaint learned and fully knew of the exact location, quality and character of the soil of said respective lots of land and the quality and kinds of trees planted thereon by the Harding Land Company, and of the nature and care and cultivation given to said lots by the Harding Land Company, and of the fact that peach trees had not grown successfully as expected; that each of the purchasers agreed that if the Harding Land Company would take off the peach trees and replace pear trees, that each of them would accept the lots, * * * and in all other respects said purchasers were satisfied with said lots and the orchards thereon, and accepted same according to their respective contracts, and that Glenn D. Hart became a stockholder in the Harding Land Company, and a sales agent for it, and as such stockholder and sales agent actually in-

spected each of the tracts, and that Mr. and Mrs. Hart, prior to July, 1913, while in full possession of all the facts involved, approved and ratified their contracts, and the defendant land owners allege that for the reasons stated neither of the respective purchasers nor the apepllees, Hart, herein ought now to be admitted to allege that they or any of them have been damaged by the alleged failure of said peach trees to grow or by any alleged defects in fruit trees, or by reason of the said soil being, as alleged, unfit for the growing of fruit trees or being in any way deficient or contrary to the representations of the Harding Land Company at the time of said respective sales or at any time. (Record, pp. 30-32.)

Upon a trial of the issues in the lower court as above outlined, before Hon. R. S. Bean, Judge, a decree was entered granting a rescission of all three contracts and awarding a judgment in favor of the appelles, Hart, for the return of the moneys paid on the purchase price under the three contracts against the appellant, Harding Land Company. (Record, pp. 226-231.)

Appellant makes the further claim on its behalf that the plaintiff can maintain no suit upon the contracts made with her assignors, because the assignments either affirm the contracts, so as to preclude rescission, or the plaintiff is claiming assignments of mere litigious rights which cannot be assigned. A sufficient answer to this contention is that appellant interposed no such defense in the court below

and seeks by a mere statement in its brief to inject it into the record as an issue on appeal, although no such defense was ever thought of, pleaded or considered upon the trial in the lower court.

ASSIGNMENTS OF ERROR.

It is not required of these appellees to set forth the assignments of error since they appear in the brief of the appellant. But the appellees desire to call the attention of the court to these assignments of error in the following particulars:

Of the nine assignments of error set out in appellant's brief and upon which appellant predicates his case for review in this court, seeking a reversal of the decree of the lower court, not one state any particular error, nor indicate to court or counsel in what respect the court erred. In fact, these assignments specify in effect nothing more than that the court erred in deciding the case at all, and that the decree is erroneous in being for the wrong party. There is nothing in any of the assignments of error specifying in any particular whatever wherein the court erred, and by the mere reading of such assignments of error it will be clear that they contain no assertion which would indicate to the appellate court what questions it is called upon to decide, and it will be equally evident none of the assignments of error even suggest any of the questions of fact or law argued in appellant's brief. All of appellant's assignments of error are so general in their terms as to fail to raise any questions for the consideration of this court.

POINTS OF LAW AND AUTHORITIES.

I.

None of the so-called assignments of error set out separately and particularly any error made by the trial court, as is required by Rule 11, of this court, and are therefore not entitled to consideration.

Rule 11, United States Circuit Court of Appeals for the Ninth Circuit.

Richardson v. Walton, 61 Fed. 535.

Metropolitan Nat. Bank v. Rogers, 53 Fed. 776, at 780.

II.

An assignment of error which merely recites that the court erred in decreeing a certain thing, as for instance, "the rescission of a contract," is too general in that it does not state any particular error and only amounts to stating that the court erred in so deciding, and will not be noticed in the appellate court.

Florida Cent. & P. R. Co. v. Cutting, 68 Fed. 586.

Doe v. Waterloo Min. Co., 70 Fed. 455.

Hart v. Bowen, 86 Fed. 877.

Oswego Twp. v. Trav. Ins. Co., 70 Fed. 225.

Supreme Lodge K. of P. v. Wethers, 89 Fed. 160.

Sov. Camp W. O. W. v. Jackson, 97 Fed. 382.

III.

An assignment of error which is too general in its terms to be noticed, cannot be aided by an attempt to make the same more particular in the brief.

Doe v. Waterloo Min. Co., 70 Fed. 455.

Sov. Camp W. O. W. v. Jackson, 97 Fed. 382.

IV.

Nothing can be assigned as error which contradicts the record, nor can the appellant be allowed to assign for error the ruling of the court in respect to any defense not set up in his plea or answer. Appellate courts cannot amend the pleadings, nor can they allow this to be accomplished by an assignment of error.

Bates v. Coe, 98 U. S. 32-47.

Johnsonburg Brick Co. v. Yates, 177 Fed. 389.

Mesa Market Co. v. Crosby, 174 Fed. 96.

B'd of Com. of Denver v. Home Sav. Bank, 200 Fed. 28.

Morril v. Jones, 106 U. S. 466.

V.

The defense of estoppel is not available in a federal court of equity unless specially pleaded.

Bates Fed. Equity Procedure, Secs. 310-312.

Penn. Co. v. Cole, 132 Fed. 668.

Mesa Market Co. v. Crosby, 174 Fed. 96.

Mayberry v. Louisville & J. Ferry Co., 60 Fed. 645-6.

In re Stoddard Bros. Lbr. Co., 169 Fed. 190;

Affirmed Mock v. Stoddard, 177 Fed. 611.

Morse v. United States, 41 App. D. C., 374.

This is the rule in Oregon.

Rugh v. Ottenheimer, 6 Ore. 231.
Remillard v. Prescott, 8 Ore. 37.
Gladstone Lbr. Co. v. Kelly, 129 Pac. 763.
Lane v. Myers, 141 Pac. 1022.

VI.

Issues not tried in the lower court will not be heard for the first time on appeal.

Mesa Market Co. v. Crosby, 174 Fed. 96.
The Chusan, 5 Fed. Cases, No. 2717.

VII.

Questions cannot be imported into a case on appeal, by assignment of alleged error in the brief or otherwise, the pleadings must develop it, or no attention can be accorded same on appeal.

Peck v. Tribune Co., 154 Fed. 330.

Giles v. Harris, 189 U. S. 475.

Drexel v. True, 74 Fed. 12.

Zadig v. Baldwin, 166 U. S. 488.

Cornell v. Green, 163 U. S. 80.

VIII.

When a court has considered conflicting evidence, and made its findings and decree thereon, they must be taken as presumptively correct unless an obvious error has intervened in the declaration of the law, or some serious mistake has been made in consideration of the evidence.

Gorham Mfg. Co. v. Emery, etc. Dry Goods Co., 104 Fed. 243.

Manhattan L. Ins. Co. v. Wright, 126 Fed. 88.

Vanderbilt v. Bishop, 199 Fed. 420.

ARGUMENT.

It is apparent from a mere reading of appellant's brief that counsel for appellant has placed no reliance whatever upon his assignments of error. This is evident as counsel in his argument predicates his demand for a reversal of the decree upon four propositions therein stated, no one of which is brought before this court by an assignment of error, or even remotely suggested to the court under the assignments of error set out in appellant's brief. Attention of the court is called to appellant's assignments of error:

Assignment No. I merely states that the trial court erred in granting the rescission of a certain contract to which reference is therein made.

Assignment of Error No. II consists of a mere statement that the trial court erred in decreeing the

return of the money paid on the contract referred to in the first assignment of error.

Appellant's assignments of error III and IV, and V and VI, are of like tenor and effect as assignments I and II, respectively.

Appellant's assignment of error No. VII is confined to a mere statement that the trial court erred in rendering a decree and judgment in favor of the plaintiff for a certain sum of money and costs.

Appellant's assignment of error No. VIII merely recites that the trial court erred in not entering a decree in favor of appellant instead of for plaintiff.

Appellant's assignment of error No. IX merely recites that the trial court erred in deciding the case in favor of the wrong party.

I.

Rule 11 of the Circuit Court of Appeals provides that "the plaintiff in error or appellant shall file with the clerk of the court below, with his petition of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged, * * * and errors not assigned according to this rule will be disregarded, but the court may at its option, notice a plain error not assigned."

The errors assigned by appellant do not comply with this rule of the court in that they fail to state

such alleged errors with a particularity that will enable this appellate court to review the determination of the lower court. This objection is true as to each and all of appellant's assignments of error.

There is no attempt made in any of the assignments of error to in any way indicate or point out the particular fact or point of law upon which error of the lower court may be predicated, and for this court to modify the decree upon strength of the assignments of error made or any of them, would be for it to make a complete examination of the record on its own initiative and to say therefrom that the decree of the lower court was against the equity of the case, although no definite issue of fact or point of law had been presented to it for particular consideration.

In the case of *Richardson v. Walton,* 61 Fed. 635, the suit being one to reform articles of dissolution between partners on the ground that they had been procured by fraud and duress, the court held that it would not review the determination of the lower court in the absence of an assignment of error which directed its attention to the precise error alleged and relied upon. At page 536 of the opinion, the following statement appears:

> "That the burden was upon the complainant to establish the fraud he alleged, by clear and satisfactory proof, is unquestionable; and that he failed to do so, our examination of the record

has entirely satisfied us. But, if this question of fact had been a doubtful one, this court would not have been disposed to review the finding of the court below with respect to it, in the absence of any assignment specifically pointing out, and indicating with particularity, the precise error alleged and relied upon."

The same point was before the court for its determination in the case of *Metropolitan National Bank v. Rogers,* 53 Fed. 776, cited in the case of *Richardson v. Walton, supra.* At page 780 of the opinion the rule is laid down, "Where error is alleged in the findings of fact by a lower court, the assignment, to entitle it to consideration in the appellate court, should specifically and plainly point out the particular error alleged."

II.

There is the further objection to each of appellant's assignments of error, in this, that they are too general to be noticed. In the case of *Florida Cent. & P. R. Co. v. Cutting,* 68 Fed. 586, one of the errors urged was:

"That the court erred in making its order and decree herein dated the 9th day of February, A. D. 1895, on exception to the master's report in the above entitled case." The court held: "That such an assignment did not state any particular error, in that it did not indicate to the court or counsel in what respect the court erred. In

fact the assignment is nothing more than the court erred in deciding the case at all."

In the case of *Doe v. Waterloo Min. Co.,* 70 Fed. 455, it was held that an assignment of error stating that "there is error in said decree in this, that the court, upon the whole evidence, should have rendered a decree in favor of the complainant," is too general to be noticed.

In the case of *Hart v. Bowen,* 86 Fed. 877, it was held that an assignment of error which "complains that the court entered judgment in favor of the plaintiffs and against the defendants," was too general to be noticed.

In the case of *Oswego Township v. Travelers Ins. Co.,* 70 Fed. 225, it was held that "assignments of error which merely states that the court erred in admitting and rejecting testimony, that the verdict is contrary to the law, and not supported by the evidence, and that the court erred in instructing the jury to find a verdict for the plaintiff, and in rendering judgment for plaintiff, brings nothing to the attention of the appellate court, and totally fails to comply with Rule 11 of the Circuit Court of Appeals."

To like effect is the holding of the court as to a similar assignment in the case of *Supreme Lodge K. of P. v. Wethers,* 89 Fed. 160.

In the case of *Sov. Camp W. O. W. v. Jackson,*

97 Fed. 382, it was held that "an assignment and specification of errors in an equity case, which in effect, only charge that the decree was erroneous in being for the wrong party, and suggest none of the questions of fact or law argued in the brief, will be disregarded and the appeal dismissed."

III.

The appellant, on pages 13 and 14 of his brief, has attempted to aid his assignment of errors by stating four propositions upon which he relies to secure a reversal of the decree in this case, claiming that the evidence sustains the contentions so made. Objection is made to this effort on the part of the appellant to aid his assignment of errors, which are too general in their terms to be noticed, more particular in his brief, and the court's attention is called to the rule enunciated in the case of *Doe v. Waterloo Min. Co., supra,* in which case it appears that there were nine assignments of error in the transcript, all of which were in too general terms to be noticed. In the brief seven additional assignments of error were made, and appellant contended that these additional assignments were only specifications under the first assignment, in the transcript. The court held that, "The attempt to make the assignments of error more particular in a brief is not proper. It is in fact an attempt to amend the record in this particular without permission of court."

The decision of the court in the case of *Sov. Camp W. O. W. v. Jackson, supra,* dismissed the appeal, re-

fusing to consider questions of fact and law discussed in appellant's brief not "set out separately and particularly in the assignments of error" in the transcript.

IV.

While none of appellant's assignments of error bring to this court's attention the questions of fact or law discussed under the third and fourth statements of fact set out on pages 13 and 14, of appellant's brief, which counsel contends is shown by the evidence, we submit to the court that this will avail not, as appellant has failed to assert either of the defenses in his answer in the lower court, which he now seeks to inject into the record, without even the formality of an assignment of error, but by mere assertion thereof and argument thereon in his brief. (See Appellant's Answer, Record, pp. 32 to 40.)

This is clear from the decision in the case of *Bates v. Coe,* 98 U. S. 32-47, wherein the court held, "nothing can be assigned as error which contradicts the record, nor can the appellant be allowed to assign for error the ruling of the court in respect to any defense not set up in his plea or answer. Appellate courts cannot amend the pleadings, nor can they allow the same to be accomplished by an assignment of error."

In the case of *Johnsonburg Brick Co. v. Yates,* 177 Fed. 389, the court held that "the statute of limitations cannot be first set up in the Circuit Court of Appeals."

In the case of *Mesa Market Co. v. Crosby,* 174 Fed. 96, it was held, "Where no other than issues of fact were joined in the lower court upon the pleading of a counterclaim, the question whether the defendant was barred by estoppel from maintaining such counter claim cannot be considered for the first time in the appellate court."

In the case of *B'd of Com. of Denver v. Home Sav. Bank,* 200 Fed. 28, it was held that the question "whether a board of commissioners of a city and county had authority to issue a certificate of indebtedness in the form of a negotiable instrument would not be reviewed on appeal where it had not been presented to the trial court."

In the case of *Morril v. Jones,* 106 U. S. 466, where upon argument it was contended that judgment below was right because it appears from the testimony which had been incorporated in the bill of exceptions "that the importation was from Prince Edward Island, it was not from 'beyond the seas'." The court held, "it is sufficient answer to this objection that no such point was made below."

V.

Under appellant's fourth contention in his brief (page 14), counsel seeks to raise as an issue on appeal a defense not presented to the lower court, and about which there is not one word in the entire record of this case, and for the first time presented to this court in appellant's brief, it is this: Appellant

insists "that plaintiff is estopped to seek a rescission of the assigned contracts."

The leading case on this proposition which clearly enunciates the rule in the federal courts is, *Penn. Co. v. Cole,* 132 Fed. 668, holding that "the defense of estoppel in a Federal Court of Equity is not available unless specially pleaded and cited with approval, to like effect. Bates Fed. Equity Procedure, Secs. 310-312."

The case of *Mesa Market Co. v. Crosby,* 174 Fed. 96, the court held, "Where no other than issues of fact were joined in the lower court upon the pleading of a counterclaim, the question whether the defendant was barred by estoppel from maintaining such counterclaim cannot be considered for the first time in the appellate court."

In the case of *Mayberry v. Louisville, etc. Ferry Co.,* 60 Fed. 645, at page 656, a case where appellant sought to avail himself of an estoppel in the appellate court, the court refused to consider the question because it had not been considered or even thought of in the trial court, holding, "An estoppel by recitals in a contract, being a species of estoppel *in pais,* cannot be availed of, when not specially pleaded."

In the case, *In re Stoddard Bros. Lbr. Co.,* 169 Fed. 190, (U. S. D. C. Idaho) Dietrich, Judge, held, where objections were made by certain creditors to the allowance of certain claims on the ground that the claimant was in fact a member of the bankrupt

concern, "that estoppel is a defense, which must be affirmatively pleaded and proved by one seeking to avail himself thereof;" and upon appeal by Mock, one of the objecting creditors, to this court, in the case of *Mock v. Stoddard,* 177 Fed. 611, this ruling of the lower court was sustained.

In the case of *Morse v. United States,* 41 App. D. C. 374, the court held that "the objection that a party is estopped on the pleadings to assert a vital fact cannot be successfully interposed for the first time on appeal."

It is also the rule in Oregon that estoppel is not available unless pleaded. Boise, Judge, in the case of *Rugh v. Ottenheimer,* 6 Ore. 231, held, "an estoppel, to be relied on as a defense, should be pleaded, and when not done cannot be considered in the case." Also in an opinion by the same judge in the case of *Remillard v. Prescott,* 8 Ore. 38, at page 44, in an equity case, held that "appellant's seeking to claim title by estoppel, if they intended to rely on such title, they should have pleaded it in the complaint as they had an opportunity to do so, and therefore the matter of estoppel cannot be considered in the case." The same rule was adhered to by the Oregon Supreme Court in the case of *Gladstone Lbr. Co. v. Kelly,* 129 Pac. 763, in equity, holding "the defense of estoppel cannot be considered when not pleaded." To like effect the same court in the case of *Lane v. Myers,* 141 Pac. 1022, in equity, held, an equitable estoppel to be available must be pleaded.

VI.

It is manifest therefore that since appellant did not tender issue in the lower court on either of the propositions numbered 3 and 4, in his brief, that he cannot be heard in this court, under the rule that "issues not tried in the lower court will not be heard for the first time on appeal." This is the rule enunciated in the case of *Mesa Market Co. v. Crosby, supra,* holding that the defense of estoppel could not be urged for the first time on appeal. Also in the case (in equity) *The Chusan,* 5 Fed. Cases, No. 2717, holding that defendant on appeal will be confined to defenses set up in his answer.

VII.

Questions cannot be imported into a case on appeal, by assignment of alleged error in the brief or argument, the pleadings must develop it, or no attention can be accorded same on appeal. The attention of the court has already been called to the fact that the two defenses urged by appellant in his brief under propositions 3 and 4, were not brought to this court by any assignments of error, nor do such defenses appear in the appellant's answer in the lower court.

In the case of *Peck v. Tribune Co.,* 154 Fed. 330, the court held, "questions not raised in the lower court will not be considered on appeal," and in the case of *Giles v. Harris,* 189 U. S. 475, the court held that, "jurisdictional amount cannot be raised for the first time on appeal." In the case of *Drexel v.*

True, 74 Fed. 12, the court stated, "It is the province of an appellate court to review the rulings of the trial court on questions actually brought to the attention of the trial court and decided by it;" and held, "objections other than those going to the jurisdiction of the court, not presented to the trial court, will receive no attention on appeal."

In the case of *Zadik v. Baldwin,* 166 U. S. 488, the court held, "Assignments of error cannot be used to import a question not in issue or determined below." Also the case of *Cornell v. Green,* 163 U. S. 80, it was held, "An assignment of error cannot be availed to import questions into a cause, which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court, under the fifth section of the act of March 3, 1891." In this last case the appellant sought a reversal of a decree by an assignment of error, "that said finding deprived said complainant of his property without due process of law."

VIII.

In his brief counsel for appellant devotes a considerable portion of his argument to a discussion of the question as to whether the evidence justified the lower court in determining that false and fraudulent representations were made inducing the making of the contracts. Counsel does not predicate his argument upon any assignment of error.

This is evident from the fact that counsel in writ-

ing his brief not having brought this question to the court's attention by an assignment of error, seeks to have this court examine the evidence adduced upon the trial. This court's attention is called to the opinion of the lower court, which appears on pages 219 and 222, inclusive, of the Record, from which it will be readily ascertained that to review the lower court's findings on the question of fraud it would be necessary to examine almost the entire record to determine whether the lower court was justified in its conclusions. We do not feel called upon to discuss this question, since in the absence of an assignment of error the question is not before this court for consideration, and in view of the authorities already cited and discussed in this brief counsel will not be permitted to inject the question into the record by a mere argument thereof in his brief.

In the case of *Gorham Mfg. Co. v. Emery, etc. Dry Goods Co.,* 104 Fed. 243, the court held, "When a court has considered conflicting evidence, and made its findings and decree thereon, they must be taken as presumptively correct, unless an obvious error has intervened in the declaration of the law, or some serious mistake has been made in the consideration of the evidence."

Likewise in the case of *Manhattan L. Ins. Co. v. Wright,* 126 Fed. 88, it was held "the finding and decree of a court of equity are presumptively right and they should not be disturbed or modified by the appellate court unless an obvious error has inter-

vened in the application of law or some grave mistake has been made in the consideration of the facts."

In the case of *Vanderbilt v. Bishop,* 199 Fed. 420, this court emphasized the rule in this language, "Findings of the trial judge in an equity suit based upon the evidence of witnesses before him and resulting in a substantial conflict with respect to material issues, will not be set aside on appeal."

CONCLUSION.

In the absence of any assignments of error meeting the requirements of Rule 11, of this court, there is no question of fact or law properly before this court for consideration, and the decree of the lower court is conclusive upon appellant and should be affirmed and this appeal dismissed.

Respectfully submitted,

E. A. LUNDBURG,

Solicitor for Appellees Hart.

CERTIFICATE.

I, E. A. Lundburg, solicitor for appellees Hart, hereby certify that the foregoing is a true and correct copy of the said Appellees' Brief, and of the whole thereof, in the within entitled cause.

.....

Solicitor for Appellees Hart.

ACKNOWEDGMENT OF SERVICE.

State of Oregon, County of....., ss.

I hereby acknowledge service of Appellees' Brief in the within entitled cause, on me in..... County, Oregon, this.....day of....., 1916, by receipt personally of a duly certified copy thereof.

.....

Attorney for Appellant W. C. Harding Land Company.